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# Private Ordering and Workers Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation

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## *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*

HARRY ARTHURS\*

### I THE CONTEXT

New technologies, new patterns of consumption and production, new levels of intensity, magnitude, and volatility in the movement of people, information, and capital are transforming the global political economy. Many effects of this transformation become manifest in the domain of public policy, where parties across the political spectrum have embraced the neo-liberal agenda. That agenda has been characterized, perhaps hyperbolically, as the 'hollowing out of the state': facilitation of transnational business activity; reduction of corporate and personal taxes and cuts in public expenditures, especially on social welfare; deregulation of domestic markets. These developments in turn are weakening, perhaps fatally, the labour market strategies and institutions of the prior dispensation, the post-war Keynesian welfare state: counter-cyclical job creation, collective bargaining, protective labour legislation, and equality-enhancing strategies.<sup>1</sup> And most importantly, in the new global political economy, most states have come to feel that they cannot return to their former interventionist approaches to the labour market: either they suffer from a failure of will—they are afraid to alienate transnational corporations (TNCs) and risk losing investment, revenues, and jobs; or they suffer from a failure of imagination—they cannot see how to regulate TNCs more

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<sup>1</sup> This argument does not address three important claims: (1) that in some respects—immigration, social discipline, and facilitation of corporate activity—the state has become more active, not less; (2) that in the long term, neo-liberal policies will generate a rising tide which will lift all boats (or sink all ships); (3) that in the short term, neo-liberalism has constrained, but not fundamentally damaged, the social welfare state. None of these claims is inconsistent with the point made above—that public policy changes have put at risk familiar labour market strategies and institutions.

aggressively because so many key activities and actors lie beyond their juridical space.<sup>2</sup>

Needless to say, not all consequences of neo-liberalism are felt in the domain of public policy. Some appear in very specific contexts, in communities and workplaces, in the lives of families and individuals. These can be summed up as a shift in power relations in favour of a limited group of corporate actors—TNCs, a privileged group of their business allies and partners, and a cosmopolitan elite of investors, executives, professionals, technical experts, and consultants closely associated with their activities. By contrast, many workers, their unions and families, and local businesses, elites, and communities have suffered a loss of power, and sometimes (not always) of income and well being.

But that is not quite the whole story. Transnational corporations may have promoted, and benefited from, neo-liberal policies; they may have enhanced their power *vis-à-vis* other actors; but they are not totally free to do as they please. States retain residual powers, both in theory and in reality; they can amend treaties, enact regulations, retract concessionary arrangements, and raise taxes if they are prepared to risk the consequences. Thus, neo-liberal policies, though dominant, remain to a degree contestable. After all, even oligarchic governments—even TNCs, even neo-liberal economists—must know that they themselves are at risk in the long term if the promises of globalization remain unfulfilled, if important constituencies become disaffected, if societies are conflicted and disorderly.

Hence the recent calls by some leading figures of world capitalism for more attention to honest and orderly markets, to equitable social and labour policies, to responsible environmental practices and to democratic politics.<sup>3</sup> At least in the view of these leading figures, and of the corporate community they exemplify, citizens do retain some influence—albeit more potential than actual—as moral agents, voters, consumers, strikers, and rioters. If TNCs want workers to work in their factories, consumers to consume their goods, and governments to govern in their interest, they must appear to be ‘responsible’ in the way they treat workers, consumers, and communities. And by a happy coincidence, a modest body of research seems to suggest that they can be responsible and profitable too. There is money to be made in ‘ethical investment’ and ‘sustainable development’;

<sup>2</sup> Stone, K. V. W., ‘Labor and the Global Economy: Four Approaches to Transnational Labor Regulation’ (1995) 16 *Michigan Journal of International Law* 987.

<sup>3</sup> See, e.g., Wolfensohn, J. W., ‘The Other Crisis’ (Address to the World Bank Group, 6 Oct. 1998) and *A Proposal for a Comprehensive Development Framework* (Discussion Draft, 21 Jan. 1999)—both located at [www.worldbank.org/cdf/cdf-text.htm](http://www.worldbank.org/cdf/cdf-text.htm); Schwab, K., and Smadja, C., ‘Globalization Backlash is Serious’, *The Globe and Mail*, 16 Feb. 1996, B10; Soros, G., *The Crisis of Global Capitalism* (New York: Public Affairs, 1998).

social market policies do not seem to impair the efficiency and adaptability of workers;<sup>4</sup> and economic prosperity may correlate positively with civic mindedness<sup>5</sup> and progressive labour practices.<sup>6</sup>

However, even if TNCs wish to consolidate their power and profitability by projecting an image of responsible behaviour in labour markets and elsewhere, they confront a problem of presentation and persuasion. In the previous dispensation, 'acting responsibly' was fairly easy to demonstrate—TNCs could say they were meeting their obligations under state labour law in their home country or host countries. No longer, not with state labour law confined by national boundaries and the extraterritoriality doctrine, rolled back by aggressive deregulation, enfeebled by the defunding of workplace inspectorates, dependent on the support of rump unions and workers terrified that their work will be 'outsourced' and their jobs moved 'offshore'. In such a context, state law is no longer plausible as benchmark for responsible corporate behaviour.

In principle, TNCs, their advisors, and apologists might have solved the problem of a plausible benchmark by supporting the reinvigoration of state law, helping to build effective transnational institutions or entering into a new social contract with workers and communities. However, what they have chosen to do instead is to promulgate their own benchmark, their own self-imposed law: 'codes of conduct'. These codes typically commit TNCs to treating their workers fairly, and some contain compliance procedures designed to give credibility to the project of self-regulation. There is a double irony here. First, by projecting their labour codes into the transnational economic sphere, TNCs commit themselves to respecting freedom of association, due process, fair wages, and the dignity of their workers—norms which were embedded in the very systems of state law which TNCs themselves were instrumental in undermining. Secondly, by adopting voluntary codes, TNCs have, in effect, engaged in the 'reproduction' of liberal legality in the transnational economic field, a strategy which in the field of socio-legal scholarship has an unlikely provenance—Santos's description of the legal system created by the poor residents of a Brazilian *favela*.<sup>7</sup>

However, irony should not be confused with coincidence. The proliferation of codes has not only proceeded in tandem with the most recent

<sup>4</sup> See, e.g., Blank, R. (ed.), *Social Protection versus Economic Flexibility: Is There a Trade-Off?* (Chicago, Ill.: University of Chicago Press, 1994). See also OECD, *Employment Outlook* (Paris: OECD, 1999) ch. 4.

<sup>5</sup> Putnam, R., *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, NJ: Princeton University Press, 1993).

<sup>6</sup> Sengenberger, W., and Campbell, D., *The Role of Labour Standards in Industrial Restructuring* (Geneva: Institute for Labour Studies, 1994).

<sup>7</sup> De Sousa Santos, B., 'The Law of the Oppressed: The Construction and Reproduction of Legality in Pasagarda' (1977) 12 *Law & Society Review* 5.

wave of globalization; it seems to be causally related. During the 1970s, in response to a wave of third world, trade union, and economic nationalist complaints about rising foreign investment and increasing influence of foreign-based multinationals, various international agencies—as well as the International Chamber of Commerce—adopted model codes designed to promote good corporate citizenship,<sup>8</sup> which in turn triggered a spate of academic writing at the end of the decade and into the 1980s.<sup>9</sup> However, in the 'new world economic order' of the 1980s—with labour in decline, developing countries increasingly dependent on TNC investment, and national political and economic elites reconciled to globalization—the initial international momentum which had produced these codes dissipated. Nonetheless, a new momentum favouring codes developed during the 1980s, as human rights groups—and protest groups with quite varied agendas—sought to curtail TNC investment and business activity in apartheid-era South Africa, Northern Ireland, Soviet Russia, and the People's Republic of China;<sup>10</sup> most of these codes subsided in due course, along with the controversies which provoked them. However, for reasons which will be explored below, codes have come back into fashion. A recent OECD document shows that since the early 1990s, significant numbers of TNCs and their sectoral organizations have adopted codes, some 60 per cent of which deal wholly or partly with employment standards.<sup>11</sup> ILO and UNCTAD reports have also remarked on the recent proliferation of TNC voluntary corporate codes—especially codes of

<sup>8</sup> International Chamber of Commerce, *Guidelines for International Investment* (Paris: ICC, 1972); OECD, *Guidelines for Multinational Enterprises* (Paris: OECD, 1976); International Labour Office, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (Geneva: ILO, 1977). A United Nations report recommended adoption of a draft code of conduct for MNEs in as early as 1974; however, it has never been formally ratified.

<sup>9</sup> See, e.g., Baade, H., *The Legal Effects of Codes of Conduct for MNEs* (Bielefeld: Centre for Interdisciplinary Research: University of Bielefeld, International Symposium on Legal Problems of Codes of Conduct for Multinational Enterprises, 1979); Baker, J., and Ryans, J., 'Multinational Corporation Investment in Less Developed Countries: Reducing Risk' (1979) 18 *Nebraska Journal of Econ. & Business* 61; Gunter, H., 'The International Labour Office Declaration of Multinational Enterprises and the International Code of Conduct Movement' (1981) 4 *Loyola of Los Angeles International & Comparative L. Journal* 1; Note, 'Host State Treatment of Transnational Corporations: Formulation of a Standard for the United Nations Code of Conduct on Transnational Corporations' (1983-4) 7 *Fordham International L. Journal* 467; Horn, N. (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Deventer: Kluwer, 1980).

<sup>10</sup> For a general review see Perez-Lopez, J., 'Promoting International Respect for Worker Rights through Business Codes of Conduct' (1993) 17 *Fordham International L. Journal* 1; Compa, L., and Hinchcliffe-Darricarrère, T., 'Enforcing Labor Rights through Corporate Codes of Conduct' (1995) 33 *Columbia Journal of Transnational Law* 663.

<sup>11</sup> The OECD study identified some 182 codes, promulgated by transnational bodies, by major TNCs, or by influential sectoral and stakeholder associations. Of the codes whose dates of promulgation are given, the great majority came into force after 1995; virtually none was operative before 1990. *Codes of Corporate Conduct*, Working Party of the Trade Committee, Trade Directorate (Paris: OECD TD/TC/WP (98) 74 (Dec. 1998).



employment standards<sup>12</sup>—as have several government, NGO and scholarly studies.<sup>13</sup>

The questions to be addressed in this chapter, then, are why TNCs have 'volunteered' to subject themselves to codes at this particular moment, just when they are becoming increasingly immune from other constraints, whether these codes represent the successful 'reproduction of legality' and how states, workers, unions, and other actors are likely to be affected by them.

### I WHY 'VOLUNTARY' EMPLOYMENT CODES?

There is nothing new under the sun, certainly not codes governing employment in transnational enterprises. From the seventeenth to the nineteenth centuries, the Crowley steel works—near Sunderland, in the north of England—was governed by a 'book of laws' (sometimes called the 'ancient constitution') which laid down the rights and obligations of workers in this huge paternalistic proto-global enterprise.<sup>14</sup> The great global trading companies—the Hudson's Bay Company, the East India Company—became quasi-governments and promulgated legal codes which comprehensively regulated the behaviour of their employees (and other people) all over the world. Early Victorian manufacturers and mine owners—a formidable presence in Imperial and international trade—had statutory power to establish their own codes or 'special rules' dealing with safety and work practices.<sup>15</sup> Codes—work rules and employment manuals, adopted unilaterally, and collective agreements, adopted bilaterally—have been a fixture of modern industrial employment. And even

<sup>12</sup> ILO, *Overview of Global Developments* (Working Party on the Social Dimensions of the Liberalization of Trade, Report to the International Labour Office, Nov. 1998) GB. 273/WP/SDL/1 found at [www.ilo.org.ch/public/english/20gb/docs/gb273/sdl-1.htm](http://www.ilo.org.ch/public/english/20gb/docs/gb273/sdl-1.htm). See also United Nations Commission on Trade and Development (UNCTAD), *World Investment Report 1994—Transnational Corporations, Employment and the Workplace* (New York/Geneva: United Nations, 1994) 349 ff.

<sup>13</sup> See Perez-Lopez and Compa and Hinchcliffe-Darricarrère, above, n. 10; Culpepper, R., and Whiteman, G., 'The Corporate Stake in Social Responsibility' in Hibler, H., and Beamish, R. (eds), *Canadian Corporations and Social Responsibility* (Ottawa: The North-South Institute, 1998); and US Department of Labor, Bureau of International Affairs, *The Apparel Industry and Codes of Conduct: A Solution to the International Child Labor Problem?* (Washington, DC: Department of Labor, 1996).

<sup>14</sup> The Crowleys owned the largest steel works in Europe, imported raw materials from Sweden, Spain, and Russia, and exported finished products to India, the colonies, and various European countries: Flinn, M. W., *Men of Iron: The Crowleys in the Early Iron Industry* (Edinburgh: The University Press, 1962).

<sup>15</sup> Arthurs, H. W., *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985) ch. 4.

thoroughly globalized, post-modern, post-industrial 'empowered' employees have continued to be ruled by employment codes.<sup>16</sup>

All of these codes share two main characteristics. They operate internally, within the enterprise, to define terms of employment such as wages, working conditions, discipline, and quality standards; to educate workers to adhere to them; and to ensure orderly and consistent enforcement of those terms by supervisors and managers. And they operate externally, by mimicking the rhetoric, forms, and processes of law, to convince conscientious investors, consumers, NGOs, and governments of the legitimacy of what are characteristically unequal, and sometimes exploitative, employment relations.<sup>17</sup> Indeed the ultimate legitimization strategy is to co-opt potential critics by enlisting them as sponsors of a code regime. Finally, some codes are adopted on a sectoral or industry-wide basis. Such codes give each signatory a stake in policing the others, diminish the risk that 'free riders' will benefit from goodwill accruing to the sector as a whole, and make it more difficult for non-complying firms to compete on the basis of their lower labour costs and standards.<sup>18</sup> All of this contributes to the operational efficacy of the code, which in turn makes it a more convincing legitimating device.

The internal functions of codes—their tutelary and disciplinary functions—have been dealt with elsewhere, by authors from E.P. Thompson<sup>19</sup> to Stuart Henry;<sup>20</sup> the appearance of rival, even subversive, normative systems 'in the shadow' of these corporate codes has been documented by Burawoy;<sup>21</sup> the reflexive, rule-generating tendency of large corporations has been addressed by Teubner and others;<sup>22</sup> and I have attempted to situate all of these approaches to workplace codes within a general theory

<sup>16</sup> See, e.g., 'Workplace Ethics' (1986) 31/12 *Management Solutions* 12; Collett, P., 'Codes of Conduct: A Framework for Ethics' (1998) 68/1 *Australian Accountant* 29; Whitehead, M., 'People Don't Seem to Know Right from Wrong' (1999) 5/3 *People Management* 14. See also Sewell, G., and Wilkinson, B., ' "Someone to Watch Over Me": Surveillance, Discipline and the Just-in-Time Labour Process' (1992) 26 *Sociology* 271.

<sup>17</sup> Hepple, B., 'A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct' (paper presented at the W. G. Hart Workshop; London: Institute of Advanced Legal Studies, 1999). Hepple and I both use 'legitimation' in the sense of a calculated attempt to win acceptance for one's actions by appealing to shared values and beliefs. There is considerable controversy surrounding the term. See Hyde, A., 'The Concept of Legitimation in the Sociology of Law' [1983] *Wisconsin L. Review* 379.

<sup>18</sup> See Purchase, B., 'The Political Economy of Voluntary Codes' (Industry Canada, unpublished, 1997).

<sup>19</sup> Thompson, E. P., 'Time, Work-Discipline and Industrial Capitalism' in his *Customs in Common* (New York: The New Press, 1991).

<sup>20</sup> Henry, S., 'Disciplinary Pluralism: Four Models of Private Justice in the Workplace' (1987) 35 *Sociological Review* 279.

<sup>21</sup> Burawoy, M., *Manufacturing Consent* (Chicago, Ill.: University of Chicago Press, 1979).

<sup>22</sup> Teubner, G., *Global Law without the State* (Aldershot/Brookfield: Dartmouth Publishing, 1997).

of legal and industrial pluralism.<sup>23</sup> Their external functions—their legitimating and market regulating functions—are the focus of this chapter.

Of course, there is no clear division between internal and external audiences. For workers and consumers, managers, and government officials to be persuaded to accept voluntary codes as the equivalent of legal protections, all must acquiesce in roughly similar values and assumptions. Hence the importance of the dominant neo-liberal discourse which disparages state regulation and stresses the inevitability of globalization, the positive contributions of TNCs, and the invincible logic of their structures and policies. Moreover, codes must be perceived to achieve results roughly comparable to those achieved through alternative means such as statutory regulation or collective bargaining. If there is excessive dissonance between the reality of workplace life and the rhetoric of an employment code, workers will be disillusioned, the public will be disenchanted, TNCs will be publicly embarrassed, and self-regulation will cease to be regarded as legitimate. Hence the need to create 'legal' procedures that can both bring about and testify to the positive consequences of self-regulation. What is puzzling about the recent proliferation of voluntary employment codes, however, is that their underlying values remain somewhat obscure, their procedures deeply flawed, and their outcomes unverified.

Values first. Traditional hierarchy and reciprocal obligation may have seemed the natural order of things to several generations of Crowleys, their workers, and their latter-day counterparts in developing countries; the inexorable logic of market forces acting upon 'free' contracting parties (backed by occasional state coercion) may have been all that was needed to justify employment practices in the dark satanic mills of nineteenth-century England; and the Wagner Act's promise that workers were to be given democratic voice and vote in their relations with their employer may have been, for a time, persuasive to enlightened employers, militant employees, and an American public concerned about escalating industrial warfare. But none of these seems to have much salience today. Procedures next. Only a minority of codes summarized in the OECD study—and in other studies—actually include any procedural arrangements at all, only a handful involve anything approaching independent monitoring, and virtually none involves third-party enforcement. And, finally, outcomes. To put it plainly, there is little or no evidence about how codes actually affect the behaviour of TNCs. Thus, it is something of a mystery why voluntary codes should have become so numerous in recent years.

<sup>23</sup> Arthurs, H. W., 'The Law of the Shop: The Debate over Industrial Pluralism' (1985) 38 *Current Legal Problems* 83; Arthurs, H. W., 'Landscape and Memory: Labour, Law, Legal Pluralism and Globalization' in Wilthagen, T. (ed.), *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (Amsterdam: Royal Netherlands Academy of Arts and Science, 1998), 21.



Several alternative hypotheses may be advanced. First, transnational corporations are often said to depend upon their 'human capital' for success in a knowledge-based global economy. If they are to attract and retain the workers they need, enlightened self-interest dictates that they should both preach high employment standards—by adopting voluntary codes—and practise them. This hypothesis may indeed hold true for a privileged cadre of peripatetic executives, technical experts, and professionals. However, it does not seem to have much to do with millions of rank-and-file production workers, who—if treated as 'human capital' at all—seem to be regarded as low-yield and essentially disposable assets. Most of these workers are involved in the global economy only in the sense that what they make is ultimately marketed abroad, often under global trade marks; they themselves work in intensely localized labour markets, often in the third world or on the periphery of the advanced economies. Moreover, most of them are not privileged knowledge workers; they generally perform routine manual work, under conditions that are often substandard and sometimes appalling. In any event, they all too seldom enjoy the wages and working conditions that are implicitly promised by corporate employment codes or the many international regimes which mandate them.

A second hypothesis is that globalization has not only benefited investors and other privileged elites, but that it has also strengthened the worldwide acceptance of human rights and worker entitlements. Voluntary codes, on this view, are no less important a source of such rights and entitlements than international treaties and agreements or national legislation; indeed, they are proof that the appropriate norms have percolated into and become operational in actual workplaces, where they count most. Again, there is modest evidence to support this hypothesis; but there is also considerable experience to the contrary. In the *maquiladoras*, the enterprise zones of the People's Republic of China, the carpet factories of Pakistan, or, for that matter, the manufacturing plants of southern Ontario or South Wales, expanded investment, employment opportunities, and markets are premised on government policies designed to establish a 'business friendly' environment. These policies generally involve derogation from established worker rights and entitlements and, in extreme cases, forcible suppression of worker and community organizations. Nonetheless, it is relatively rare for businesses—the intended beneficiaries of these policies—to protest against repressive labour legislation or strategies, or to insist that they would prefer to apply the high standards set out in their voluntary codes, such as protection of the right to organize and bargain collectively. One must ask, therefore, whether a deep attachment to the notion of labour rights and entitlements is in fact what animates the adoption of voluntary codes by transnational business.

The third hypothesis is, to me, the most persuasive. The interconnect-  
edness of the global economy, some note, has made it vulnerable to  
disruption. Raw materials from one country are processed in another,  
turned into manufactured parts in a third, integrated into finished prod-  
ucts in a fourth, shipped to distributors in a fifth, and marketed around  
the world. Each stage in the production process, each border crossed, each  
market served, each part of the larger corporate empire is potentially a  
site where employment practices can be called into question. Stoppages  
by production workers, refusals to handle by transport workers,  
consumer boycotts, and political pressures in any one of a score of coun-  
tries may have ramifying consequences. This is not to suggest that work-  
ers, their unions, or transnational advocacy groups can mobilize support  
easily, that the legal systems of most countries tolerate such mobilization,  
or that transnationals lack ample power to defend themselves in most  
conflictual situations. Nonetheless, it is in the interests of transnational  
corporations to cosmeticize conflict, if they can, to pacify workers,  
neutralize unions, and reassure NGOs, governments, and consumers—all  
objectives that can be facilitated by adopting voluntary codes. This is the  
most obvious explanation of the recent popularity of 'voluntary codes'  
which are, in this perspective, not quite so voluntary as all that.

## II THE SUCCESSFUL REPRODUCTION OF LEGALITY?

Voluntary codes may cover safe and healthy working conditions, grievance  
procedures, collective bargaining, measures forbidding discrimina-  
tion, child labour, or substandard wages. They may establish procedures  
for inspection, processing complaints, and resolving disputes. Thus, at a  
superficial glance, voluntary codes of employment may seem capable of  
reproducing—approximately, if not precisely—many of the substantive  
and procedural characteristics of state labour legislation.

At a middle distance, however, the differences between state law and  
voluntary regimes become more apparent. Legislation applies to the  
generality of enterprises; codes only to those which have chosen to  
promulgate a code or make themselves subject to one. Unlike the rela-  
tively precise and directory language of regulatory statutes, the language  
of most codes is vague, hortatory, and not well suited to compelling  
compliance in circumstances which are unclear or controversial. Virtually  
all statutes are enforced ultimately by the coercive agencies of the state;  
with rare exceptions, no coercive power is available to enforce voluntary  
codes. And, in principle, those charged with violating state labour stan-  
dards are judged by a court or independent regulatory tribunal; those  
charged with violating codes are generally judged by themselves or their

nominees. Codes, then, are at best only a rough approximation of liberal legality, not a strict replication of it.

But, on close examination, the picture is not quite so clear. In effect, we have been comparing an ideal model of legislation and state regulation with the current, flawed reality of self-regulation. If we revisit each of the points just made, we will see that voluntary codes bear a closer resemblance to state regimes than we may care to admit.

Because of constitutional limitations, political influence, and materiality thresholds, the coverage of state regulatory regimes in practice is less than universal,<sup>24</sup> and sometimes no more comprehensive than that of voluntary regimes administering codes adopted by sectoral or stakeholder organizations. Statutory language—especially in labour statutes—may appear clear, but even longstanding interpretations can be frustrated by lengthy challenges or overturned by unsympathetic courts; in both state and self-regulating systems, corporations tend to have the last word. While, in principle, the state's coercive power can be mobilized to secure compliance with labour laws, this seldom takes place in practice. Recently, many states have abandoned aggressive and costly inspection and enforcement programmes in favour of self-reporting and self-discipline by employers, and formal adjudication and punitive action in favour of alternative dispute resolution. State enforcement systems, in practice, have often become no more rigorous than those established under voluntary codes. Even independent adjudication—which supposedly guarantees the integrity of state regulatory practice, and which has no counterpart under voluntary schemes—does not operate as cleanly and decisively as it is supposed to. Even in their golden age, state regulators were susceptible to 'regulatory capture', the outcome of symbiotic association with their 'clientele', of lobbying and patronage, of inadequate resources. Judges, by contrast, remained independent and were never 'captured'; but they did not need to be: they seldom demonstrated much sympathy for workers' interests, or much understanding of their organizations and strategies.

Ironically, then, given that state regulation of the workplace is in disrepair and disrepute, voluntary corporate regimes may not produce such very different outcomes. And now a further irony: intentionally or unintentionally, voluntary regimes sometimes become entangled with state policy-making and state legality instead of merely providing an alternative to the one and a facsimile of the other.

<sup>24</sup> E.g., a recent study estimates that 33% of all private-sector workers and 25% of all women workers are excluded from coverage of the US National Labor Relations Act: Cobble, D. S., 'Making Postindustrial Unionism Possible' in Friedman, S. (ed.), *Restoring the Promise of American Labor Law* (Ithaca, NY: Cornell ILR Press, 1994) 285.



## III VOLUNTARY CODES AND THE STATE

If, as hypothesized, voluntary code regimes are evidence of the immunity of TNCs from state regulation, it must also be said that states themselves actively or passively promote the adoption of such codes and even become directly involved in drafting and administering them.

Governments formulating labour market policies have always conducted an ongoing process of implicit—even explicit—negotiation with advisory bodies, industry representatives, major corporations, unions, NGOs, and other stakeholder groups. In recent times, however, the focus of negotiations has shifted as a result of the desire of neo-liberal governments to win the approval of investors and maintain the confidence of financial markets especially for their macro-economic policies.<sup>25</sup> In the result, public policies affecting the labour market have arguably become even more negotiable than they were during the hey-day of corporatism.<sup>26</sup> However, negotiations now virtually exclude the labour movement, although macro-economic policies shape the labour market and in turn appear to play 'a major role in shaping the trajectory of employer strategies and employment relations'.<sup>27</sup>

How does this new dynamic of policy negotiation lead to the adoption of voluntary codes? Employers in general have been emboldened by their dominant position in the policy process and the labour market, and by widespread acknowledgement of their need to resort to domestic or offshore labour practices which will enable them to respond to global competition. Consequently, some of them may choose—or, from their perspective, be driven—to engage in egregious, irresponsible, and exploitative practices: the use of child labour, brutal repression of a strike, a fatal failure to adhere to safety standards. The consequences of such practices are then publicized by a union or social advocacy group, widely reported by the media, and used as the rallying cry for a boycott of the company's goods or a campaign for legislation designed to suppress the practice and exclude the offending goods from market. Governments, confronted with public demands that they 'do something', often respond by asking the employer in question to promise to behave in the future, a

<sup>25</sup> Castles, F., 'The Dynamics of Policy Change: What Happened to the English-speaking Nations in the 1980s' (1990) 18 *European Journal of Political Research* 491.

<sup>26</sup> See Fogleson, R., and Wolfe, J. (eds.), *The Politics of Economic Adjustment: Pluralism, Corporatism and Privatization* (New York/Westport/London: Greenwood Press, 1989); Crouch, C., and Dore, R. (eds.), *Corporatism and Accountability* (Oxford: Clarendon Press, 1990).

<sup>27</sup> Goddard, J., 'Managerial Strategies, Labour and Employment Relations and the State: the Canadian Case and Beyond' (1997) 35 *BJIR* 399.

promise which is likely to be expressed in the form of a voluntary code.<sup>28</sup>

Voluntary codes for employers are obviously attractive for employers: no legal controls or sanctions, lower compliance costs (or none), and good publicity eclipsing bad. And codes are attractive for governments: they permit them to be seen to be concerned and responsive without provoking negative reactions from investors, breaking current ideological taboos against regulation, or incurring the transaction costs associated with inspection, prosecution, and other traditional forms of intervention. Moreover, voluntary codes may actually resolve problems, or at least alleviate them to the point where they cease to be a political issue. And of course, if they do not—if codes fail to produce the desired practical or political outcomes, if, in the end, conventional regulation is unavoidable—governments will at least be able to say to employers, investors, and ideological critics that it was the last resort, not the first. Parenthetically, in some federal states, codes have the additional attraction of offering a way around potential jurisdictional conflicts over who can regulate what.<sup>29</sup>

When legislation is ultimately enacted—with or without the acquiescence of important constituencies—negotiation does not cease. It continues on a daily basis in the context of administration and enforcement. This crucially important element of 'negotiation' results from the fact that the state's resources—its juridical powers, personnel, and political credibility—are seldom sufficient to support inspection of every workplace, prosecution of every offending employer, or proscription of every new hazardous process or practice. Consequently, from the earliest Victorian labour legislation<sup>30</sup> to the present,<sup>31</sup> governments have sought to enhance compliance and lighten the burdens of administration by persuading or compelling employers to take 'ownership' of labour legislation, to inter-

<sup>28</sup> As these words are written, publicity is being given to the settlement of a class action against US garment retailers on behalf of 50,000 Asian garment workers on Saipan, a US Pacific territory. The workers, who alleged that they were kept in a form of peonage, contrary to US and international human rights law, agreed to accept the introduction of an employment code, monitored by Verité, an independent monitoring agency with atypically strong complaint and remedial procedures under the joint supervision of the retailers and human rights and labour organizations. See Sweatshop Watch, website at <http://www.igc.org/swatch/Marianas/settlement.html>.

<sup>29</sup> Canada may be an extreme case, because constitutional interpretations have assigned employee-employer relations to provincial control, despite the fact that, in general, provinces cannot effectively deal with corporations which conduct operations outside their boundaries or abroad. But even in states with more appropriate constitutional arrangements, conflicting local and national interests and values may well make the enactment of national legislation politically awkward.

<sup>30</sup> Arthurs, above, n. 15, chs. 4 and 5.

<sup>31</sup> Levine, D., 'Reinventing Workplace Regulation' (1997) 39 *California Management Review* 98.



nalize its values so that they are routinely translated into workplace norms, without the need for government inspection, admonition, or prosecution. Codes appear to be a promising strategy for enhancing compliance: they are written by employers, administered by employers, and, hopefully, internalized in the operating procedures of employers.

Nowhere is the challenge of securing compliance more difficult than in the case of the offshore operations of domestic employers, investors, or traders. Here, the inspector's writ does not legally run; here, practices are likely to be most egregious; here, workers see confirmation of their worst fears of a 'race to the bottom'.<sup>32</sup> Codes once again may provide the answer. Firms which adopt and adhere to codes in their foreign operations effectively relieve their own governments of the legal, practical, and political challenges of extraterritorial inspection and enforcement. Various privileges—participation in trade missions, export loan guarantees, access to government purchasing programmes—can be extended to firms which are code-compliant, and denied to those which are not. And, finally, if these privileges do not suffice to shield compliant employers from competition by non-compliant firms with lower labour costs, codes can be used as the template for legislation or regulations designed to bar 'rogue' firms from domestic markets. For all of these reasons, states have pursued an active policy of promoting code regimes for locally-based corporations trading abroad through technical initiatives, mediation amongst stakeholders, and public endorsement of specific high profile code initiatives,<sup>33</sup> as well as through direct or symbolic commitment as code signatories.<sup>34</sup>

<sup>32</sup> Langille, B., 'General Reflections on the Relationship of Trade and Labour (or Fair Trade is Free Trade's Destiny)' in Bhagwati, J., and Hudec, R. E. (eds.), *Fair Trade and Harmonization* (Cambridge, Mass./London: MIT Press, 1996) 231.

<sup>33</sup> The Canadian government has been particularly active in this regard. It has commissioned a series of research studies which were presented to a major stakeholders' conference on 'Exploring Voluntary Codes in the Marketplace' (Sept. 1996), issued an extensive report—*Standards Systems: A Guide for Canadian Regulators* (Ottawa: Industry Canada, 1998)—and worked with stakeholders to develop a users' guide—*Voluntary Codes: A Guide to their Development and Use* (Ottawa: Industry Canada/Treasury Board, 1998). It has also maintained an ongoing Voluntary Codes Project with an activist Director (Kernaghan Webb, [webb.kernaghan@ic.gc.ca](mailto:webb.kernaghan@ic.gc.ca)) and a website (<http://www/strategis.ic.gc.ca/volcodes>). Finally, it has helped or is helping to promote the use of voluntary codes, especially by Canadian-based firms doing business abroad. See, e.g., Corporate Social Responsibility Initiative funded by Human Resources Development Canada in co-operation with the Conference Board of Canada, described in Khoury, G., Rostami, J., and Turnbull, P., *Corporate Social Responsibility: Turning Words into Action* (Ottawa: Conference Board of Canada, 1999); International Code of Ethics for Canadian Businesses, described in Culpepper and Whiteman, above, n. 13.

<sup>34</sup> E.g., President Clinton presided over the signing at the White House of the much-heralded Apparel Industry Partnership Code (14 Apr. 1997), *New York Times*, Sec A, 17. The AIP Code has since been denounced by its union and church signatories: see below, text at n. 45.

Finally, voluntary codes of labour standards may, paradoxically, give rise to explicit consequences in domestic and international law.<sup>35</sup> There is little litigation so far involving codes, especially in the labour area, and what follows is largely conjectural. However, in principle it seems possible that codes may, in given circumstances, materially affect the outcome of litigation. For example, codes which originate in agreements within sectoral organizations or amongst stakeholder groups may constitute legally binding contracts. Governments may make compliance with employment codes a formal condition of tendering and performance in procurement contracts, or in order to gain access to markets.<sup>36</sup> And codes may be used by judges to pour substantive content into vague normative standards—'implied' terms on which to ground an unlawful dismissal suit, a standard of 'reasonableness' to define the duty of care owed to injured workers, evidence of what constitutes 'due diligence' by corporate directors who are sued for failing to prevent workplace harassment.

Thus, state regulation and voluntary code regimes are not mutually exclusive alternatives, nor do voluntary code regimes simply reproduce systems of state regulation. To some extent the two systems exist in a state of symbiosis, and are more similar in their strategies and outcomes, more ideologically aligned, more mutually dependent and operationally integrated than is generally believed—but only to some extent. State regulation and self-regulation are neither interchangeable nor—ultimately—compatible systems. Self-regulation represents an assertion by corporations that they should be allowed to decide for themselves to what extent their interests will take priority over the claims of workers, communities, and states—an assertion which has gained both popularity and credibility in a period of globalization and neo-liberal politics. State regulation, by contrast, rests on a more democratic paradigm of governance. It proceeds from the premise that communities and states must be able to respond politically, legally, and practically through enforceable legislation to moral condemnation of the egregious failures of corporate self-regulation. However, moral condemnation tends to be muted in these days of neo-liberalism, and the practical effects of state regulation constrained by globalization and other powerful forces. So self-regulation

<sup>35</sup> See generally Webb, K., 'Voluntary Initiatives and the Law' in Gibson, R. (ed.), *Voluntary Initiatives: The New Politics of Corporate Greening* (Peterborough, Ont.: Broadview Press, 1999), 32; Webb, K., and Morrison, A., 'Voluntary Approaches, the Environment and the Law: A Canadian Perspective' in Carraro, C., and Leveque, F. (eds.), *Voluntary Approaches in Environmental Policy* (Dordrecht: Kluwer Academic Publishers, 1999), 229; Horn, N. (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Deventer: Kluwer, 1980).

<sup>36</sup> However, this form of 'regulation by contract' exposes governments to the risk of being accused of violating international trade rules which ban non-tariff barriers and uncompensated regulatory 'takings', or of exceeding their powers as defined by domestic legislation or constitutional provisions.

and state regulation coexist—with states generally accepting that self-regulation is better than nothing, and corporations acknowledging that they had better at least be seen to regulate their workplaces with some rigour, rather than allow grievances to fester, worker militancy to grow, and pressures to build for the return of the interventionist state.

#### IV VOLUNTARY CODES AND NON-STATE ACTORS

A new 'discursive community' has grown up in and around the 'code industry'. It includes scholars, consultants, dispute resolvers, ombudspersons, and independent monitors who constitute a kind of civil service for code regimes; norm-setting and monitoring bodies such as the International Standards Organization, the Ethical Trading Initiative, Verité, and the Council on Economic Priorities which promulgate or monitor global labour standards; and—proof positive of the growing market for voluntary regulation—the global accounting and consulting firms which now offer 'independent' auditing services to verify code compliance. By shaping the emerging architecture of codes and code compliance strategies, by defining the interaction between codes and state law and policy, by mediating amongst the parties implicated in specific code regimes, the participants in this discursive community establish the conceptual repertoire and professional discourse of self-regulation. In this sense, they play a central role in determining the success or failure of the project of legitimation which—in my view—lies at the heart of the emergence of voluntary codes at this particular juncture in the globalization process.

However, legitimation is not simply produced; it must be consumed as well. This may be the source of some difficulty, as corporations, governments, and members of the 'voluntary code community' may see things quite differently from workers who experience the employment practices of TNCs, or the unions, social movements, and advocacy groups which seek to alter those practices. In the former group, there seems to be a degree of optimism about voluntary codes. As a recent Canadian government report suggests:

Voluntary codes represent an innovative approach to addressing the concerns and needs of consumers, workers and citizens while at the same time helping Canadian companies to be more competitive. . . . A supplement and, in some circumstances, an alternative to traditional regulatory approaches, voluntary codes can be inexpensive, effective and flexible market instruments.<sup>37</sup>

<sup>37</sup> Introduction by Hon. J. Manley, Minister of Industry, and Hon. M. Massé, President of the Treasury Board, *Voluntary Codes—A Guide for their Development and Use* (Ottawa: Industry Canada/Treasury Board, 1998).

This optimism, also expressed by knowledgeable academic observers,<sup>38</sup> human rights activists,<sup>39</sup> and corporate leaders,<sup>40</sup> is to some extent supported by surveys of corporate practice.<sup>41</sup> However, there is also evidence that some firms are reluctant to adopt codes because of concerns about compliance costs and legal consequences as well as reputational risks stemming from overheated public expectations.<sup>42</sup> And, more importantly, many firms that have adopted codes are not actually implementing them.<sup>43</sup>

For workers and unions, compliance is, of course, the crucial issue. This is true in two senses. They are anxious to ensure that independent, accountable, and effective agents administer codes; and they want to see evidence that codes are actually producing positive outcomes for workers who are supposed to benefit from them. It is precisely on the issue of compliance that one of the most widely heralded transnational code initiatives—the Apparel Industry Partnership<sup>44</sup>—has recently run into difficulty. Labour, church, and human rights groups abandoned the AIP, protesting that corporate members had refused to agree to effective enforcement machinery or to guarantee their employees a ‘living wage’, and that ‘the AIP code could do more harm than good, because it would give corporations a “fig leaf” to cover up their exploitation of workers abroad’.<sup>45</sup>

This judgement may be wrong-headed or simply premature. As some commentators have argued, a second and third generation of codes may overcome the defects of the first,<sup>46</sup> and each partial victory in the struggle against exploitation ultimately contributes to a more effective regime of transnational labour standards.<sup>47</sup> However, that effective regime may be a long time coming. In the global economy, there is no obvious way to

<sup>38</sup> Compa and Hinchcliffe-Darricarrère, above, n. 10.

<sup>39</sup> Forcese, C., *Commerce with Conscience? Human Rights and Corporate Codes of Conduct and Putting Commerce into Conduct* (Montreal: International Centre for Human Rights and Democratic Development, 1997).

<sup>40</sup> See, e.g., Haas, R. D., CEO of Levi Strauss, quoted in US Labor Department, above, n. 13, 14, n. 19.

<sup>41</sup> Lindsay, R. M., Lindsay, L. M., and Bruce, V., ‘Instilling Ethical Behaviour in Organizations: A Survey of Canadian Companies’ (1996) 15 *Journal of Business Ethics* 393.

<sup>42</sup> Cottrill, K., ‘Global Codes of Conduct’ (1996) 17 *Journal of Business Strategy* 55.

<sup>43</sup> Lindsay *et al.*, above, n. 41.

<sup>44</sup> Codes of Conduct in the US Apparel Industry, above, n. 13.

<sup>45</sup> Stephens, M., ‘Code Name: Cover-Up’ (Winter 1999) *UNITE Magazine*, <http://www.uniteunion.org/magazine/win99/pvh.html>. It appears that the resignation was actually triggered by the closure of the only unionized plant in Guatemala by one of the AIP corporate members.

<sup>46</sup> Compa and Hinchcliffe-Darricarrère, above, n. 10.

<sup>47</sup> Trubek, D., Mosher, J., and Rothstein, J., *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks* (Madison, Wis.: International Institute, University of Wisconsin-Madison, 1999).



force corporations to adhere to their own voluntary codes. Not through law: there is so far no transnational proxy for the state with a monopoly over coercive action. Not through concerted labour action: unions seldom collaborate across boundaries, and remain divided along fault lines of national origin, interest, ideology, history, and legal norms.<sup>48</sup> Not through consumer boycotts: citizens concerned about labour standards may be persuaded from time to time to exercise their rights in the 'global market for citizenship'<sup>49</sup> to protest the exploitation of workers at home or abroad, but they lack economic power, legal recourse, and the institutional means to sustain such initiatives.

In such a context, one might argue, half a voluntary code is better than no regulation. But while this argument may have merit, it does not address a further concern of labour, human rights advocates, and social movements: that to acknowledge the potential of corporate good intentions and to accept employer self-regulation even as a transitional measure is to legitimate the existing global economic system and its ultimately unpalatable manifestations in workplaces and communities around the world.

## V CONCLUSION

So we return to the issue of legitimacy. Voluntary codes are emerging as the most significant feature of a fragile, inchoate regime of transnational labour market regulation. Employers are supposed to be the object of that regulation, but they are also its primary authors and administrators; they can conjure it up or make it disappear pretty much whenever and for whatever reason they wish. But workers—supposedly the subjects, the beneficiaries, of this regulation—lack the power to create it, significantly to influence its terms, or even to insist that they receive its promised benefits; they can only denounce it and try to rob it of its legitimacy. We must somehow square this circle.

<sup>48</sup> See, e.g., Haworth, N., and Ramsay, H., 'Matching the Multinationals: Obstacles to International Trade Unionism' (1986) 6 *Int'l. Journal of Sociology and Social Policy* 55; Bediner, B., *International Labour Affairs—The World Trade Unions and the Multinational Companies* (Oxford: Clarendon Press, 1987); but for a more optimistic view see Windmuller, J., 'The International Trade Union Movement' in Blanpain, R. (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (4th revd. edn, Deventer: Kluwer, 1990).

<sup>49</sup> Downes, D., and Janda, R., 'Virtual Citizenship' (1998) 13 *Canadian Journal of Law and Society* 27; and see Schneiderman, D., 'Constitutionalizing the Culture-Ideology of Consumerism' (1998) 7 *Social & Legal Studies* 213.